

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-07/08-336
)
 Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAAIL) finding her ineligible for the Choices for Care (CFC) program. The CFC program is a Medicaid waiver program that allows individuals needing nursing home level of care the option of remaining in their own homes. The CFC program provides payment to personal care attendants who help individuals with their activities of daily living (ADLs) and their instrumental activities of daily living (IADLs). The issue is whether the petitioner meets the eligibility criteria for the CFC program.

Procedural History

The petitioner applied for the CFC program on or about January 18, 2008. DAIL denied petitioner's application on or about February 25, 2008. A Commissioner's Review was heard on April 9, 2008. The Commissioner made a decision on or about April 25, 2008 denying petitioner's application. The

petitioner mailed her request for fair hearing on July 25, 2008. The hearing request was filed on July 28, 2008.

DAIL filed a Motion to Dismiss on August 7, 2008 alleging that the petitioner's request for fair hearing was untimely based on the April 25, 2008 date of the Commissioner's Review. The Commissioner's Review notified petitioner of her right to file an appeal within ninety days of receipt of the Review. DAIL was requested to file an Affidavit including the date the Commissioner's Review was mailed to petitioner prior to the scheduled telephone status conference of September 2, 2008. The affidavit was not filed.

A telephone status conference was held on September 2, 2008. Petitioner suffered a head injury in September 2007 that affects her memory. As an accommodation to the petitioner's disability pursuant to the Americans with Disabilities Act and in light of the absence of a mailing date for the Commissioner's Review, petitioner's request for hearing was considered timely. The case was scheduled for hearing on September 22, 2008.

On September 18, 2008, the Board received a letter from DAIL asking the Board to consider petitioner's case moot. DAIL alleged that petitioner received comparable services

through other agency programs and that an AHS coordinator was trying to have petitioner withdraw her request.

The hearing commenced on September 22, 2008. Petitioner had not received the September 18, 2008 letter from DAIL. Petitioner receives funding for personal care services through the Attendant Services Program, Personal Directed Attendant Care (PDAC) program. The PDAC eligibility criteria are different than the CFC criteria. Eligibility for PDAC does not preclude eligibility for CFC although such eligibility may affect the amount of services provided to an eligible recipient of CFC services. Fair Hearing No. 21,164. The case was not moot, and the hearing was rescheduled.

Petitioner's case was heard on October 2, 2008 and November 12, 2008. The record was held open until November 20, 2008. The following decision is based upon the evidence adduced at hearing.

FINDINGS OF FACT

1. The petitioner is forty-nine years old and disabled. Petitioner's diagnoses include a long history of depression, chronic fatigue syndrome, chronic sleep disturbance, chronic back pain, irritable bowel syndrome,

multiple allergies, and weight problems. Petitioner receives Social Security Disability benefits, Medicare and Medicaid.

On or about September 17, 2007, petitioner was in a motor vehicle accident. As a result of the accident, she has post-concussive syndrome and experiences difficulties with her memory and keeping information organized.

Petitioner's condition is complicated by her chronic sleep disorder. She may sleep for several days in a row or she may not wake until 4:00 to 6:00 p.m. Due to the combination of her sleep disorder and memory problems, petitioner has difficulty managing her medications. Petitioner's mother, V.C., has played a key role regarding petitioner's medication management by telephoning petitioner multiple times to awaken and remind petitioner to take her medications.

After her accident, petitioner was helped by a friend for several months. After her friend stopped helping her, petitioner was without services and started her search for other services. Petitioner has become frustrated since she does not fit into the criteria for other state programs. Petitioner does not qualify for the Traumatic Brain Injury services offered by the state. In addition, the Howard

Center found that petitioner was not eligible for Community Rehabilitation Services.

Petitioner was found eligible for PDAC Medicaid services on May 12, 2008. Petitioner was approved for forty-nine hours every two weeks. The PDAC program allows petitioner to hire and direct personal care attendants. Petitioner has had a difficult time finding and keeping personal care attendants.

Petitioner is looking for help making her medical appointments, eating nutritiously, taking her medications on time, cleaning services, and periodic help getting into and out of her bathtub and bed.

2. Petitioner was assigned to N.G.'s caseload during late December 2007. N.G. does noncategorical field services for the Agency of Human Services. N.G. worked with petitioner to find appropriate home supports. N.G. was not sure that petitioner qualified for CFC services but told petitioner to submit an application in January 2008. N.G. testified that she was aware that the wait list for high needs individuals was closing the end of January 2008. N.G. testified that petitioner needs help cooking, cleaning, getting to appointments, and, at times, getting into and out of the bathtub.

3. P.B. is a Long-Term Care Clinical Coordinator (LTCCC).¹ She conducted a clinical assessment on January 25, 2008 of petitioner. P.B. was assisted by S.L., a newly hired LTCCC. During the clinical assessment, P.B. observed petitioner sit on an exercise ball and walk unaided in her apartment.

P.B. rated petitioner as independent for toilet use, eating, transferring, and personal hygiene. P.B. rated petitioner as needing supervision for bed mobility, bathing, dressing, and mobility. In addition, P.B. rated the Instrumental Activities of Daily Living (IADLs) of meal preparation and medications as done with help. P.B. noted that petitioner cannot stand for long due to back pain; petitioner's back pain makes it difficult for petitioner to stand to cook and can make getting into bed more difficult. Petitioner has a hospital bed with extra padding which increases the height of the bed.

4. P.B. found that petitioner was not eligible for either the highest or high needs CFC categories. This

¹ The LTCCC uses the clinical assessment to note the type of assistance an individual needs to do his/her ADLs. The information is based upon interviewing the individual about their needs for the prior seven day period and upon observation. The level of assistance includes independent, supervision, limited assist, extensive assist, and total dependence.

decision was confirmed by the Commissioner who found that petitioner did not meet the criteria for functional physical limitations resulting from a physical condition and that petitioner did not need nursing home level of care.

5. P.B.'s testimony was consistent with her findings in her written assessment of petitioner. P.B. also explained that extensive assistance means weight bearing assistance a minimum of three times per week because the individual does not have the physical ability or muscle mass to do the ADL. Total dependence means weight bearing assistance every time an individual does an ADL. For example, extensive assistance with toileting would include placing the individual on and off the toilet, wiping the individual, and/or assisting with a catheter without any assistance from the individual. Extensive assistance with bed mobility includes moving an individual to and from a lying position, positioning the individual on the bed, and turning the individual without any assistance from the individual.

6. V.C. testified. V.C. lives in a different town and primarily keeps in contact with petitioner through daily telephone calls. She is concerned that petitioner will forget to take her medications as directed and attend her medical appointments. V.C. reminds petitioner of when to

take medications. V.C. testified that petitioner's memory is not good and that she is more short-tempered than before the accident.

7. M.M. testified on petitioner's behalf. M.M. has been petitioner's friend for over twenty years. After M.M. learned about petitioner's accident, she visited petitioner weekly and telephoned petitioner several days each week. M.M. testified that petitioner had a good memory prior to her accident. Petitioner's memory especially her short-term memory, is not as sharp. M.M. noted a lack of focus. During the first few months after the accident, M.M. helped petitioner get out of chairs by holding petitioner's hands to pull her up; M.M. testified the last time she gave assistance was in January 2008. M.M. supplied petitioner with a walker that petitioner uses outside her home. M.M. indicated that petitioner has improved over time since the car accident.

8. Petitioner testified on her behalf. Her testimony is consistent with proposed Finding of Fact Number 1.

Petitioner testified that her sleep disorder complicates finding caregivers since she needs help in the evenings. Petitioner explained that she is trying to set up a routine that includes a bath prior to sleeping and a set time for sleep. Petitioner has a seat she can use in the bathtub.

Petitioner needs help on occasion getting into and out of the bathtub due to her pain and balance problems. Petitioner can shower independently by using her shower seat and grab bars.

Petitioner testified that she periodically has difficulty getting into and out of her bed due to her pain. Petitioner's bed is too high to sit upon before lying down. Petitioner estimated that she needs help getting into and out of her bed as well as her bathtub from two to three times per week to once every couple weeks.

Petitioner testified that her memory has become spotty since her car accident. She can become irritable with family members or friends but not with others.

Petitioner testified that she contacted a nursing home and asked to be admitted. The nursing home would not admit her because she did not need nursing home level of care.

Petitioner became emotional while testifying and cried. Petitioner had a difficult time holding her emotions in check. However, petitioner was able to participate in her hearing including articulate testimony on her behalf and pointed cross-examination of P.B. On occasion, petitioner had memory lapses or needed to be redirected.

ORDER

DAIL's decision is affirmed.

REASONS

DAIL operates the Choices for Care (CFC) program through a waiver from the Centers for Medicare and Medicaid Services. The primary goal of the CFC program is to provide individuals who need nursing home level care with a choice of remaining in the community by providing home health care for Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs). CFC Regulations Section I.

The eligibility criteria are set out at CFC Regulations Section IV. Section IV.A.2 states that to be eligible:

...an individual must have a functional physical limitation resulting from a physical condition (including stroke, dementia, traumatic brain injury, and similar conditions) or associated with aging. Individuals whose need for services is due to mental retardation, autism or mental illness shall not be eligible.

DAIL has created categories of need including Highest Needs and High Needs. As of January 31, 2008, a waiting list was instituted for the High Needs group. Services for those

found eligible as high needs is limited by the availability of funds.²

An assessment of an individual's need is done by the Long Term Care Clinical Coordinator (LTCCC) who reviews the application and interviews the individual during a home visit. The LTCCC assesses the type of assistance an individual needs with ADLs and IADLs.

To repeat, the CFC program is for those individuals needing nursing home level of care. The criteria for both the Highest and High Needs Groups are being set out because these criteria emphasize the high bar for eligibility. Many individuals with serious medical conditions do not meet these criteria.

In terms of the Highest Needs Group, CFC Regulation Section IV.B.1.b states, in part:

Individuals who apply and meet any of the following eligibility criteria shall be eligible...

- i. Individuals who require extensive or total assistance with at least one of the following Activities of Daily Living (ADLs): toilet use, eating, bed mobility; or transfer, and require *at least* limited assistance with any other ADL.
- ii. Individuals who have a severe impairment with decision-making skills or a moderate impairment with decision-making skills and one of the

²Given the State's current budget crisis, the CFC program may face further cutbacks.

following behavioral symptoms/conditions, which occur frequently and is not easily altered:

Wandering	Verbally Aggressive Behavior
Resists Care	Physically Aggressive Behavior
Behavioral Symptoms	

iii. Individuals who have at least one of the following conditions or treatments that require skilled nursing assessment, monitoring, and care on a daily basis:

Stage 3 or 4 Skin Ulcers	Ventilator/Respirator
IV Medications	Naso-gastric Tube Feeding
End Stage Disease	Parenteral Feedings
2 nd or 3 rd Degree Burns	Suctioning

iv. Individuals who have an unstable medical condition that requires skilled nursing assessment, monitoring and care on a daily basis related to, but not limited to, at least one of the following:

Dehydration	Internal Bleeding
Aphasia	Transfusions
Vomiting	Wound Care
Quadriplegia	Aspirations
Chemotherapy	Oxygen
Septicemia	Pneumonia
Cerebral Palsy	Dialysis
Respiration Therapy	Multiple Sclerosis
Open Lesions	Tracheotomy
Radiation Therapy	Gastric Tube Feeding

In terms of the High Needs group, CFC Regulation Section

IV.B.2.b states:

Individuals who meet any of the following eligibility criteria shall be eligible for the High Needs group and may be enrolled in the High Needs group:

i. Individuals who require extensive to total assistance on a daily basis with at least one of the following ADLs:

Bathing	Dressing
Eating	Toilet Use
Physical Assistance to Walk	

ii. Individuals who require skilled teaching on a daily basis to regain control of, or function with at least one of the following:

Gait Training	Bowel or Bladder
Range of Motion	Training
Speech	

iii. Individuals who have impaired judgment or impaired decision-making skills that require constant or frequent direction to perform at least one of the following:

Bathing	Dressing
Eating	Toilet Use
Transferring	Personal Hygiene

iv. Individuals who exhibit at least one of the following behaviors requiring a controlled environment to maintain safety for self:

Constant or Frequent Wandering
Behavioral Symptoms
Physically Aggressive Behavior
Verbally Aggressive Behavior

v. Individuals who have a condition or treatment that requires skilled nursing assessment, monitoring and care...

Petitioner has a long history of medical problems.

Petitioner's situation was exacerbated in September 2007 when she suffered a head injury although the impacts from those injuries are lessening over time. Petitioner seeks CFC services primarily with her IADLS and limited assistance with bed mobility and transfers for the bathtub; petitioner does

not need assistance with washing herself. In eligibility cases, the burden is on the petitioner to show by a preponderance of evidence that she meets the eligibility criteria of the CFC program. This can be difficult to do.

The State has limited funds for the CFC program. The State has designated these funds for those most in need to allow nursing home eligible individuals the option of remaining in their home through the use of personal care attendants. The State also benefits since in-home care is less costly than nursing home care.

The need for nursing home level care is evident in certain cases such as a paraplegic who may need extensive assistance for positioning on/off a toilet or a person who cannot cut food or feed himself/herself due to serious functional limitations of hands and/or arms or a person with traumatic brain injury who cannot process information and wanders or consistently physically lashes out at others. Although the petitioner has serious problems, she has not shown this level of need.

The CFC assessment looks at taking a full body bath or shower as bathing. Extensive assistance includes physical help in the actual bathing. Limited assistance includes physical help transferring in and out of the bathtub.

Although the petitioner needs limited assistance or support on occasion to get into and out of the bathtub; she does not need help with bathing on a regular basis. Her need for assistance with bathing does not rise to the level of extensive assistance.

Bed mobility includes how an individual moves to and from a lying position, how the individual turns side to side and how the individual can position herself/himself in bed. Extensive assistance means weight-bearing or full help from a caretaker 3+ times per week. Limited assistance means non-weight-bearing assistance at least 3+ times per week. Supervision includes oversight and some physical help. Although the petitioner needs non-weight bearing assistance on occasion with bed mobility, she does not meet the level of extensive assistance or weight-bearing assistance of a person who needs to be placed on the bed, positioned on the bed, and then taken off the bed 3+ times per week.

Through the PDAC program, petitioner can hire personal care attendants to help her with her IADLs (cooking, cleaning, etc.) and to help her with her ADLs when the need arises.

The evidence does not show the need for extensive assistance with the ADLs listed in the regulations. In

addition, there was no evidence of a severe impairment with decision-making skills or a moderate impairment with serious behavioral symptoms. Based on the evidence, DAIL's decision to deny CFC eligibility is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4(D).

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